

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





76-1275

To be argued by  
MICHAEL B. POLLACK

By  
mail  
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P/S

In The  
UNITED STATES COURT OF APPEALS  
For The Second Circuit  
UNITED STATES OF AMERICA,

Appellee,

vs.

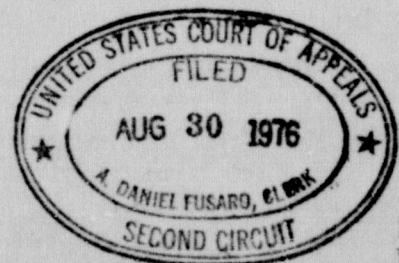
JOHNNY SELLERS,

Defendant-Appellant.

On Appeal from the United States District Court for the  
Eastern District of New York.

BRIEF FOR DEFENDANT-APPELLANT  
JOHNNY SELLERS

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To be argued by  
MICHAEL B. POLLACK

DOCKET NO. 76-1275

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
Docket No. 76-1275

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UNITED STATES OF AMERICA

Appellee,

-v.-

JOHNNY SELLERS,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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BRIEF OF DEFENDANT-APPELLANT

JOHNNY SELLERS

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

Docket No.  
76-1275

- against -

JOHNNY SELLERS  
CLARENCE STALLWORTH,

Defendants-Appellants.  
-----x

BRIEF FOR THE DEFENDANT  
JOHNNY SELLERS

PRELIMINARY STATEMENT

Johnny Sellers appeals from the judgment of conviction entered on April 26, 1976 in the United States District Court for the Eastern District of New York after a five-day trial before the Honorable John F. Dooling, United States District Judge, and a jury.

Indictment 76 Cr. 69 charges Johnny Sellers in two counts with one count of attempted bank robbery and a second count of attempted bank robbery and assault and placing in jeopardy the lives of other persons present by the use of dangerous weapons. On April 19, 1976, the trial commenced and it ended on April 26, 1976 when the jury found Sellers guilty on Count One. On June 18, 1976, Sellers was sentenced to a term of ten years of imprisonment on Count One.

Sellers is presently incarcerated pending his appeal.

#### STATEMENT OF FACTS

##### The Defendant's Case

Special Agent, Joseph D. Martinolich, was called as a witness on behalf of the defendant Sellers. Agent Martinolich testified that he was the case agent in charge of the present prosecution and that he had had the initial discussions with Rodney Campbell concerning Mr. Campbell's cooperation with the government. The agent testified as to the instructions



given to Mr. Campbell in regard to this case and stated that Mr. Campbell was never instructed to: pick out a bank that should be robbed; to steal masks from department store in order to facilitate the concealing of identity during a robbery; and authorize to purchase several items, such as hacksaw blades and nails. (Tr. p. 495-96)

Mrs. Joanne Sellers, wife of the defendant, testified as to the relationship between the defendant's niece, Amanda Jones, and Rodney Campbell. She stated that Ms. Jones was arrested for possession of a pistol that had been given to her by Mr. Campbell prior to going into the building in which she was arrested (Tr. p. 498-99). Mrs. Sellers also testified to overhearing a conversation in her home on Tuesday, January 20, 1976 between Rodney Campbell and her husband. It was her understanding of this conversation that her husband was going to do something in exchange for which Mr. Campbell would appear in court and it was his gun when Amanda Jones was arrested. (Tr. p. 503-504). Mrs. Sellers also testified that on Friday, January 23, 1976, when Mr. Campbell came to her apartment, he was carrying a McDonald bag. On said date, she had occasion to walk into her bedroom and there saw a gun next to the bag

that had been brought in by Mr. Campbell. Mrs. Sellers stated that prior to January 23, 1976, she had never seen this gun in her apartment (Tr. p. 505-507).

#### The Government's Case

Rodney Campbell testified that on January 12, 1976, he entered into an agreement with the United States Attorney, Mr. Pattison, whereby it was agreed that if Mr. Campbell cooperated with the agents of the United States Government, he would be granted immunity on all prior bank robberies to which he admitted. (Tr. p. 101-102). Mr. Campbell stated that on January 16, 1976, he met the defendant Sellers at the Sports Bar. The two gentlemen discussed the fact that Mr. Sellers had stated that at the time "he was unable to get any rods or cars to do any jobs". Mr. Campbell told defendant Sellers that he would have access to a rental car the following week.

(Tr. p. 105). Mr. Campbell further testified as to several meetings with the defendant Sellers on January 20, 21 and 22, 1976 during which they and others discussed the possibility of robbing a bank. (Tr. p. 108-120). Mr. Campbell testified that on January 20, 1976, he had obtained a car from the Federal Bureau of Investigation in which to drive the suspects. Said car was equipped with a monitoring device and a tape recording device. (Tr. p. 108). Mr. Campbell testified that in preparation



for the agreed-upon bank robbery, he stole ski masks (Tr. p. 188) and purchased nails and hacksaw blades (Tr. p. 189). In addition, Mr. Campbell testified that on the afternoon of January 21, 1976, he was the individual who determined that a certain bank looked robbable (Tr. p. 297). Mr. Campbell further testified that on January 23, 1976, five individuals in his Plymouth, supplied by the F.B.I., drove to the First National City Bank, 7-24 154th Street, Queens, New York; that upon arriving in the vicinity of the bank, Mr. Sellers got out of the car in order to "case" the bank to ascertain if it was in the same condition as the day before. (Tr. p. 130). Furthermore, Rodney Campbell stated that after circling the block several times, the car stopped in front of said bank; that at this time he could see the defendant Johnny Sellers standing in front of the liquor store and that they were never able to get out of the car prior to their arrest. (Tr. p. 133).

Willie Young, a participant in the events of January 23, 1976, testified that on January 22, 1976, he was the individual who "cased" the First National City Bank at 154th Street in Queens. (Tr. p. 332). Mr. Young also testified that on January 22, 1976, there was no decision made as to how the

bank would be robbed. (Tr. p. 335). It was Mr. Young's testimony that at the time of the arrest, the four occupants were still seated in the car; that Johnny Sellers was sitting in front of the liquor store, (Tr. p. 356) and that no weapons had been drawn by any of the five individuals who were arrested. (Tr. p. 379). In addition, it was testified that on January 23, 1976, there were no "key words" to leave the car, (Tr. p. 378) and in addition, there was no agreed-upon signal nor was any signal given by Johnny Sellers to leave the car (Tr. p. 382).

Special Agent, James F. Murphy, Federal Bureau of Investigation, testified that on January 23, 1976, he was located in a residence directly across the street from the First National City Bank on 154th Street and was monitoring the conversations in the green Plymouth (Tr. p. 391-392). Agent Murphy testified that he had an unobstructed view of the bank and was able to observe defendant Sellers walking on the sidewalk and the green Plymouth pull into the shopping center. (Tr. p. 396-399). It was his further testimony that at the time of the arrest no one exited from the car, Mr. Sellers was not observed as having a gun, and Mr. Sellers did not draw a gun at any time. (Tr. p. 400-402). Agent Murphy stated that the arrests were precipitated by the statement "Let's go" made by Rodney



Campbell who was in the green Plymouth (Tr. p. 404).

F.B.I. Special Agent Jerry F. Mortensen testified that he was assigned to the liquor store in the vicinity of 7-24 154th Street in Queens, New York on the morning of January 23, 1976. He stated that at the time he was given the signal to make the arrests, he could observe Mr. Sellers standing directly in front of the liquor store window. (Tr. p.411-412). The Special Agent testified that he had arrested Mr. Sellers and that when the defendant was searched, he located a .12 gauge shotgun in his right pocket (Tr. p. 412).

Edward T. Walker, Special Agent of the F.B.I., testified that on January 23, 1976, he was assigned to a position in Waldbaum's Super Market on 154th Street in Whitestone, Queens. (Tr. p. 428). Agent Walker testified that he was one of the arresting officers on January 23, 1976, and that when he went to the green Plymouth, he had to open the car door to make the arrests. (Tr. p. 430).

## ANALYSIS AND ARGUMENT

### I. THE TRIAL JUDGE ERRED AS A MATTER OF LAW IN DENYING THE DEFENDANT JOHNNY SELLERS' MOTION TO DISMISS THE FIRST COUNT IN THE INDICTMENT

On January 23, 1976, the defendant Sellers was arrested outside of a liquor store, with a shotgun under his overcoat and a short distance from the First National City Bank, 7-24 154th Street, Queens, New York. Contemporaneously with the arrest of the defendant Sellers, four associates were arrested by F.B.I. agents in a stopped automobile. In the automobile was found a .38 caliber revolver, ski masks, a mail bag and a gasoline can (Tr p. 415-418). The arrests were effectuated by the agents after receipt of a pre-arranged signal (Tr. p. 163) from an occupant of the car who was acting in the capacity of an undercover agent, one Rodney Campbell. Of the four occupants in the automobile, only Rodney Campbell had made any effort to alight from the vehicle (Tr. p. 133).

Of course, in testing the sufficiency of the evidence, the evidence as well as the inferences properly deducible therefrom must be received in the light most favorable to the government. United States v. Robinson, 527 F.2d 1170, 1171 (6th Cir. 1975).

However, the defendant Sellers submits that the present facts do not support a conviction pursuant to 18 U.S.C. §2113(a).



Section 2113 of Title 18 United States Code provides in pertinent part:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or...

The statutory provision lacks a definition of the "attempt".

Indeed there is no comprehensive statutory definition of attempt in federal law... to deal with the complex question of when conduct crosses the line between "mere preparation" and "attempt" only the latter being a crime. United States v. Heng Awkak Roman, 356 F.Supp 434, 436 (S.D.N.Y. 1973).

Black's Law Dictionary defines attempt as:

...an effort or endeavor to accomplish a crime, amounting to more than mere preparation or planning for it, which if not prevented, would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the part's ultimate design. Black's Law Dictionary 162 (4th ed. West 1957).

Numerous courts and legal draftsmen have endeavored to formulate an easily applied legal definition of the term "attempt". See United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied 419 U.S. 1114 (1975). A frequently approved test is the one formulated by the Supreme Court of the State of California

in People v. Buffum, 40 Cal 2d 709, 256 P.2d 317, 321, cited in United States v. Mandujano, supra at 376.

"Preparation alone is not enough, there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature..." Id.  
(Emphasis added)

An examination of the statute at issue, 18 U.S.C. §2113(a), evidences the considerations which apply in determining the commission of an attempted bank robbery.

"It is apparent that...the 'attempt' relates to the taking and not to the intimidation. Thus, what is involved in this indictment is an attempted taking by intimidation, the means being intimidation, or putting in fear instead of by force." (Original emphasis)

The government presented the theory that the possession of firearms by the individuals other than Rodney Campbell is sufficient to place fear in the F.B.I. agents and, accordingly, satisfied the statutory provision. Intimidation is to be judged by an objective standard.

"Intimidation in the law of robbery means putting in fear, and the fear must arise from the conduct of the accused rather than the mere temperamental timidity of the victim." United States v. Baker, 129 F.Supp. 684 (S.D. Cal. 1955). Accord: United States v. Jacquillon, 469 F.2d 380 (5th Cir. 1972), cert. denied 410 U.S. 938 (1973).



In order for there to be an intimidation, there must be a willful, volitional act on the part of the perpetrator which places the other individual in fear of bodily harm. United States v. Alsop, 479 F.2d 65 (9th Cir. 1973). The testimony during trial shows that at the time of the arrests, not one of the perpetrators had brandished a dangerous weapon.

(Tr. p. 379) Additionally, immediately prior to the arrests, only Rodney Campbell, of the four individuals in the car, made any effort to open a door and exit the vehicle (Tr. p. 164), and the defendant Sellers was positioned in front of a liquor store in either a standing (Tr. p. 412) or sitting (Tr. p. 356) position, depending upon whose testimony is believed. The primary conclusion to be drawn from this set of facts is that at no time on January 23, 1976, did any of the defendants willfully perform an act which forboded bodily harm to an F.B.I. agent. Furthermore, of the four agents who testified, not one stated that any defendant acted in a manner to make them fearful or to put them into fear, as statutorily required. United States v. Jacquillon, *supra*.

Assuming arguendo that the conduct of the defendants in carrying concealed deadly weapons satisfies the statutory requirement of intimidation, an 18 U.S.C. §2113(a) crime was

not committed. Any intimidation was directed solely toward the F.B.I. agents. When applying this statute, 18 U.S.C. §2113(a)

[the] Court need only determine whether this defendant did knowingly and willfully by intimidation attempt to take from the person and presence of another money in the care, custody and control of a bank whose deposits were insured by the Federal Deposit Insurance Corporation. United States v. Baker, supra, at 686

The government adduced no evidence at trial, and it is submitted they could not, proving that any of the F.B.I. agents qualified as a person from whom could be taken "money in the care, custody and control of a bank whose deposits were insured by the Federal Deposit Insurance Corporation." Id.; Cf. United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974) (bank manager taken as hostage); Rumfelt v. United States, 445 F.2d 134 (7th Cir. 1971) (hostage used in effort to get into bank).

It is submitted that on the facts adduced by the government, it failed to prove: (1) any conduct beyond mere preparation to rob a bank; (2) an unequivocal act by the defendants beyond mere intent; (3) conduct objectively demonstrating intimidation; and (3) any person intimidated in care or custody of Federally insured bank funds.



It is submitted that none of the acts testified to were equivalent to a substantial step toward the commission of the crime alleged. As stated by Judge Dwyer in United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976):

Thus, we demand that in order for a defendant to be guilty of criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, mark the defendant's conduct as criminal in nature. The acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law. Id. at 885.

Notwithstanding the attempted opening of a car door by Rodney Campbell, the undercover informant, driving to a shopping center and walking on a sidewalk outside of stores are the only overt acts by the defendants in the vicinity of the First National City Bank, 7-24 154th Street, Queens, New York. By themselves, these acts are not criminal in nature.

## II. CONCLUSION

For the above-stated reasons, the defendant Johnny Sellers submits that the trial judge erred as a matter of law in denying his Motion to Dismiss Count One in the indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

MICHAEL B. POLLACK, does hereby certify that he caused to be served on David Trager, Esq., United States Attorney, Court House, Cadman Plaza, Brooklyn, N. Y., a copy of the brief for Defendant-Appellant, Johnny Sellers, by mailing, certified mail, postage prepaid, on Friday, August 27, 1976.

*Michael B. Pollack*

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MICHAEL B. POLLACK